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No. 80-863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID A. WOLSKI,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

1. Where the sole evidence allegedly connecting petitioner to a dead body found in the woods was a credit card receipt from petitioner's account, is a police officer's statement in the affidavit to support the search warrant, that such receipt was found "near" the body, a statement of "fact", as distinct from a "conclusion", which permits the magistrate to make an independent determination of probable cause?

2. Where crucial to the finding of probable cause is an allegation that deceased was last observed hitchhiking on the same date as that borne on the credit card receipt, does the Fourth Amendment require that the affiant state who observed deceased hitchhiking and how that person knew it was deceased?

3. Was a statement in an affidavit for a search warrant that an item was found near the body, an affirmative misrepresentation where the affiant knew it was six feet from the body, on a path, commonly used by others?

4. Was there probable cause to search petitioner's house, where a credit card slip signed by him on the same date deceased was seen hitchhiking in the vicinity was found six feet from deceased on a path commonly used by the public?

5. Was there probable cause to search petitioner's house on the basis that he committed an offense, where the prosecution admits that there was not "any evidence to support defendant's arrest" and the search was necessary because "investigation had not eliminated

defendant from suspicion and no further information could be obtained except by confrontation with defendant in some way."?

6. Where the State admits there is not probable cause for petitioner's arrest, is the seizure of petitioner outside his house and bringing him into his house for interrogation while the police conduct a search of the house pursuant to a warrant, an illegal arrest, causing statements obtained during the period of interrogation to be obtained in violation of the United States Constitution?

7. Was petitioner's right to a jury trial and due process violated, where the trial court refused to instruct on the defense of self-defense because he personally had determined that petitioner's belief that he acted in self-defense was unreasonable?

8. Does the Illinois "farce or sham" standard applied by the State reviewing court in evaluating petitioner's representation by private counsel, violate the Sixth Amendment to the United States Constitution and the Fourteenth Amendment right to equal protection of the laws, where a different standard is applied to representation by court-appointed counsel?

9. Did the failure of retained counsel to sufficiently prepare so as to know the law on crucial issues result in denial of effective assistance of counsel?

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1.	
The affidavit in support of the warrant failed to satisfy the Fourth Amendment because (a) the description of the relationship of a credit card receipt to deceased's body—the sole evidence linking the defendant to the offense—as "near" the body, is not a fact but a conclusion that does not permit the magistrate to make an independent determination of probable cause; (b) there is no description by the affiant of the source of information concerning deceased's presence hitchhiking on the date of the credit card receipt, preventing the magistrate from making any determination of the reliability of that information; and (c) all the evidence presented in the affidavit demonstrated	

merely that a credit card receipt bearing the same date deceased was last seen in the vicinity was found in proximity to the body—evidence which the State admits would not support the "arrest of the defendant"—does not rise to the level of probable cause to search the defendant's home because, as asserted by the State, "the investigation had not eliminated defendant from suspicion and no further information could be obtained except by confrontation with the defendant in some way 11

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The affidavit for the warrant affirmatively misstates facts and is invalid under *Franks v. Delaware*, 438 U.S. 154 (1978) 18

3.

Where there is not evidence sufficient to support defendant's arrest, seizing the defendant outside his house and bringing him into his house and interrogating him, is an arrest and cannot be justified "so as to prevent the defendant from interfering with the search within the house"; and a statement obtained during the illegal arrest must be suppressed 19

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

Petitioner, David A. Wolski, (hereafter, defendant) respectfully prays that a Writ of Certiorari be issued to the Appellate Court of Illinois, Second District, to review its decision affirming his conviction for murder, as adjudged by the Circuit Court of Kendall County, Illinois.

JUDGMENTS AND OPINION BELOW

The opinion of the Appellate Court of which we seek review by Certiorari is reported, *People v. Wolski*, 83 Ill. App.3d 17, 38 Ill.Dec. 297, 403 N.E.2d 528 (2 Dist.) (set forth as Appendix A hereto).

JURISDICTIONAL STATEMENT

On March 24, 1980, the Appellate Court of Illinois, Second District, entered its judgment affirming petitioner's conviction and sentence. (App. A) A petition for leave to appeal to the Illinois Supreme Court, timely filed, was denied on September 29, 1980, No. 53538. (App. B) This Petition is filed within the time allowed. Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) and Rule 20.1 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides, in part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, . . . "

The Fifth Amendment to the United States Constitution provides, in part:

> "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . "

The Sixth Amendment to the United States Constitution provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Illinois Revised Statutes, Chap. 38, Sec. 9-2, provides:

"Voluntary Manslaughter

"(a) A person who kills an individual without lawful justification commits voluntary manslaughter

if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

(1) The individual killed, or

(2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

(b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable."

Illinois Revised Statutes, Chap. 38, Sec. 7-1, provides:

"Use of Force in Defense of Person

A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony."

STATEMENT OF THE CASE

To the extent that the Appellate Court's Opinion (App. A) contains material to meet the requirements of Rule 21.1(g), such is here incorporated by reference to avoid unnecessary duplication.

The specific facts pertaining to the Points which follow, including the raising of the federal questions below per Rule 21.1(h), are as follows:

Unconstitutional Search Of Defendant's Home.

On the morning of July 22, 1977, Joy E. Lewis was found dead in some bushes about 15 feet from a lane which was 60 feet from Hafenrichter Road. Late in the evening of July 22, 1977, police officers pulled up behind defendant's car as defendant drove into the driveway of his house (Tr. H. 20)[1] with his wife. With guns drawn, (Tr. H. 111), police officers placed defendant against his car (Tr. H. 88-89) and searched him, (Tr. H. 89) took him into his house, caused him to remain seated, and interrogated him while they searched his house. Defendant "would not have been allowed to leave . . ." (Tr. H. 73-74) His car was transported to the Naperville Police Garage, dismantled and submitted to scientific tests.

The police had a search warrant that commanded that:

> "The person of David N. Wolski and/or Residence at 1321 Frederick St., Naperville, IL 1976 Mercury

[1] "Tr. H." refers to Transcript of Proceedings at Motion to Suppress; "Tr." to Transcript of Proceedings at Trial; "C." to the Common Law Record; "SC." to Supplemental Common Law Record; "App." refers to Appendix to this petition.

2-Door Vin #6Z64S570032 Recent model Ford LTD 4-door IL 1977 regist. #238154 be searched and the following instrument, articles and things which have been used in the commission of, or which constitute evidence of the offense of murder be seized therefrom: blood, articles of clothing with blood or male or female secretions thereon, jewelry and other personal items formerly in possession of Joy E. Lewis, hair from the head of Joy E. Lewis, dirt, grass or other materials or things from the area where the body of Joy E. Lewis was found."

The search warrant was based upon an affidavit by Officer Michael Alsup. The complaint for search warrant reads:

"1. That on the 22nd day of July, the dead body of one Joy E. Lewis was discovered in a wooded area adjacent to Hafenrichter Road near the intersection of Hafenrichter Road and U.S. Route 34 in Kendall County.

2. That a 2 x 4 board with protruding nails was found near the body of Joy E. Lewis with blood thereon, which board apparently inflicted the mortal wounds.

3. That near the body was also a charge receipt from a Master Charge account of one David N. Wolski of 1321 Frederick Street, Naperville, IL bearing a date of July 21.

4. That Joy E. Lewis was last observed hitchhiking on Washington Street near Bailey Road in Naperville at 8:15 p.m. on July 21, 1977.

5. That the residence of David N. Wolski, 1321 Frederick Street is near the point of last observation of Joy E. Lewis and is approximately 1 to 1½ miles therefrom.

6. That several homes near 1321 Frederick Street are under construction and miscellaneous lumber is scattered thereabout.

7. That the aforesaid David N. Wolski is the registered owner of a 1976 Mercury 2-door VIN #686455/0032.
8. That many items found at the scene of the crime which may contain fingerprints of the person causing the death of Joy E. Lewis.
9. That a recent model Ford LTD 4-door, Illinois registration #238154, has been located for a period of time prior to the execution of this Affidavit in the immediate area of 1321 Frederick St., Naperville, IL and is believed that said vehicle was recently acquired by David N. Wolski.

The dead body was nude from the waist down and appeared to be sexually molested." (SC. 16)

Testimony demonstrated that the body was found in bushes and the receipt described in the warrant was found on a path six feet from the body. (Tr. 339, 354, 373, 582)

Prior to trial, defendant moved to quash the warrant, asserting:

> "The . . . complaint for search warrant contained insufficient facts to find probable cause . . ." (SC. 1, 3)

The trial court denied the motion, stating the warrant was based on sufficient facts. (SC. 30) The error was preserved in the motion for new trial. (SC. 37) The constitutional insufficiency of the affidavit in support of the search warrant was raised in the Appellate Court which considered the affidavit to be sufficient (App. 5a-7a) and raised on petition for leave to appeal.

Illegal Arrest Of Defendant

Defendant at 12:30 a.m. drives into his driveway, a car drives in behind him, blocking his car, (Tr. H. 20); police officers with drawn guns place him against the

car and search him; (Tr. 89) he is made to put his hands on the hood of the car; (Tr. 20) he is read *Miranda*-type warnings; (Tr. H. 21, 72-73) and not allowed to leave, (Tr. H. 14, 73-74) and moved to inside his house and ordered him to sit in a secured area of the living room, (Tr. H. 74-77) where he is interrogated (Tr. H. 74-78); and after 45 minutes, he makes a statement.

In the Appellate Court, defendant argued that the trial court erroneously denied his pre-trial motion to suppress his statement obtained in violation of the Fourth and Fifth Amendments. The Appellate Court held defendant's seizure was not an arrest, and hence, that the statements were not obtained in violation of the Fourth Amendment. (App. 9a-10a) That defendant's statement was obtained in violation of the Fourth Amendment was raised in his petition for leave to appeal.

Failure To Properly Instruct Jury

In his statements (Tr. 539-580), defendant related how he had picked up the victim as she was hitchhiking, how she directed him to a side road and, while parked, an altercation occurred; that after being kicked twice in the groin, he grabbed a piece of metal and hit her once in the head and placed her out of the car. (Tr. 543)

At trial, defendant testified in further detail concerning the incident. He testified how she initially pretended she had a gun in her purse and threatened him, and as he got out of the car, he grabbed her purse and she had no weapon (Tr. 741-743); that she then agreed to have sex, but when he got on top of her, she attacked him. (Tr. 746, 789, 818-819, 828-829)

He testified:

"She kicked me hard in the groin.

Q. And, did she say anything to you prior to kicking you in the groin?

A. No, after she did that she said that because she knew my name and she saw there was a baby carriage in your back seat, which she said that she was going to tell my wife, and she was struggling to get up off the seat to sit up, and she was again trying to kick me, and she was using her hands to scrape my face and punch me, and at that point she again, she was able to kick me or knee me in the groin again, and—

Q. Dave, did that first kick she kicked you with before she said anything, did that hurt you?

A. *Yes, I was in a lot of pain.*

Q. *Did the second kick hurt you?*

A. *Yes.*" (Emphasis added.)

He testified further that after twice being kicked in the groin he hit her with his left fist on the face, (Tr. 746-747) ". . . she fell back on the seat and then continued to struggle and attempt to kick me (Tr. 747) and there was a piece of steel . . . on the floor, and I picked it up and hit her with it at that time." (Tr. 474)

The trial judge refused to give a self-defense instruction because he believed defendant's actions were unreasonable self-defense, even though defendant testified that he acted in self-defense. The trial court stated:

"The Court: *Despite what the defendant may have testified to he believed, I don't agree there is anything in the record insofar as the facts are concerned reasonably justify anybody feeling their life was in danger of great bodily harm.* Here was a bulky man weighing 265, and she weighed 120, and all he received was a couple of *kicks in the groin*, and under all those circumstances and other circumstances alluded to by the State's Attorney, I don't think

> there is any legitimate question of fact on that to present to the jury, so I am sustaining the objections to the giving of that instruction. *Again, it is what a reasonable person would believe under the circumstances not just the defendant's belief.*" (Tr. 876-877) (Emphasis added.)

The Appellate Court affirmed this refusal by saying there was not even "some evidence" that defendant acted in self-defense. (App. 11a-13a) That the trial court's refusal properly to instruct the jury violated defendant's constitutional right was raised in his petition for leave to appeal.

Ineffective Assistance Of Counsel

Trial counsel was unaware that under the Illinois statute defining voluntary manslaughter, an "unreasonable belief" that one had to act in self-defense reduces the offense from murder to manslaughter, and hence, he failed to request a manslaughter instruction under such provision, although he requested other manslaughter instructions, as the offense is otherwise defined. (C. 36)

Trial counsel *voir dired* the jury substantially on how they would evaluate psychiatric testimony, intending to introduce such testimony on the "credibility of defendant's confession," unaware that under prevailing law, such evidence was inadmissible.

The Appellate Court rejected the assertion that trial counsel rendered ineffective assistance of counsel, applying to retained counsel's performance the "sham and mockery" test. (App. 14a-15a) The insufficiency of counsel was raised in the petition for leave to appeal.

REASONS FOR GRANTING THE WRIT

1.

The affidavit in support of the warrant failed to satisfy the Fourth Amendment because (a) the description of the relationship of a credit card receipt to deceased's body—the sole evidence linking the defendant to the offense—as "near" the body, is not a fact but a conclusion that does not permit the magistrate to make an independent determination of probable cause; (b) there is no description by the affiant of the source of information concerning deceased's presence hitchhiking on the date of the credit card receipt, preventing the magistrate from making any determination of the reliability of that information; and (c) all the evidence presented in the affidavit demonstrated merely that a credit card receipt bearing the same date deceased was last seen in the vicinity was found in proximity to the body—evidence which the State admits would not support the "arrest of the defendant"[2]—does not rise to the level of probable cause to search the defendant's home because, as asserted by the State, "the investigation had not eliminated defendant from suspicion and no further information could be obtained except by confrontation with the defendant in some way."[3]

Prior to authorization of the search of a home, the Fourth Amendment requires (1) assertion of cir-

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[2] The State in its Brief in the Appellate Court so admitted. It stated:

> "If the search had not revealed any incriminating evidence such as described in the search warrant, it is clear the police would have departed the residence without arresting the defendant since there would not have been any evidence to support that arrest." (St. Br., p. 32)

[3] and also:

> "Investigation had not eliminated defendant from suspicion and no further information could be obtained except by confrontation with the defendant in some way." (St. Br., p. 20)

cumstances sufficient to warrant a prudent man in believing that the suspect had committed the offense, *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Brinegar v. United States*, 338 U.S. 160 (1949), and (2) allegation of facts, not conclusions, because a magistrate

> "must judge for himself the persuasiveness of the facts relied upon by the complaining officer to show probable cause. He must not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime." *Giordenello v. United States*, 357 U.S. 480 (1958).

Cf. Aguilar v. Texas, 378 U.S. 108 (1964).

Here, the affidavit (1) failed to demonstrate evidence with sufficient certainty as to rise to the level of probable cause, and (2) failed to provide the magistrate with crucial facts as distinct from *conclusions*.

Crucial to link defendant to the crime is finding the credit card receipt in close proximity to the deceased's body, and that her death was of recent origin. The affiant attempted so to do in Paragraphs 1, 3 and 4.[4] These allegations are defective, for they fail to supply the magistrate with *facts* as opposed to *conclusions*.

Allegation 3—That *near* the body was also a charge receipt from a Master Charge account of one David N. Wolski of 1321 Frederick Street, Naperville, IL bearing a date of July 21—merely advised the magistrate that,

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[4] The State reviewing court stated:

> "The third allegation would lead a reasonable person to believe evidence of the crime could be found in the places sought to be searched; the sales receipt, bearing so recent a date and found near the body, established the probability that defendant was linked to the offense so as to reasonably permit the search for which authorization was sought. (App. 5a)

in the opinion of the affiant, the receipt was found *near* the body. This is a conclusion, not a fact.

The magistrate was not advised of crucial facts as to *distance*, nor was he advised as to the locale. Does the warrant advise the magistrate:

(1)	How close the receipt was to the body?	No; it merely uses the general term "near."
(2)	Whether the body was visible from where the receipt was found?	No.
(3)	Whether the receipt was found within the woods or the path?	No.
(4)	Whether it was an area secluded from the general public or used by the general public?	No.

That "near" is a conclusion is evident in an affidavit that used the term "near" five times to define clearly distinct and different distances.[5] Because

[5] 1. That on the 22nd day of July, the dead body of one Joy E. Lewis was discovered in a wooded area adjacent to Hafenrichter Road **NEAR** the intersection of Hafenrichter Road and U.S. Route 34 in Kendall County.

2. That a 2 x 4 board with protruding nails was found **NEAR** the body of Joy E. Lewis.

3. That **NEAR** the body was also a charge receipt from a Master Charge account of one David N. Wolski of 1321 Frederick Street, Naperville, IL bearing a date of July 21.

4. That Joy E. Lewis was last observed hitchhiking on Washington Street **NEAR** Bailey Road in Naperville at 8:15 p.m. on July 21, 1977.

6. That the residence of David N. Wolski, 1321 Frederick Street is **NEAR** the point of last observation of Joy E. Lewis and is approximately 1 to 1½ miles therefrom.

near[6] is the affiant's conclusion, Allegation 3 is merely the affiant's opinion that something belonging to the defendant was found in such a manner as to give probable cause to believe the defendant was involved in the homicide. This fails to satisfy the Fourth Amendment. *Aguilar v. Texas*, 378 U.S. 482 (1958).

Allegation 4,[7] necessary to create a temporal relationship between deceased's death and the presence in the area of the receipt, similarly fails to satisfy the Fourth Amendment. Absent are facts from which the magistrate could determine the reliability and credibility of the assertion that Joy E. Lewis was observed hitchhiking on Washington Street near Bailey Road in Naperville at 8:15 p.m. on July 21, 1977.

The magistrate did not know: (1) Who provided that information? (2) How that person knew they saw Joy E. Lewis? Even when information is supplied by a citizen, the affidavit must convey information demonstrating that the citizen had a basis for making and forming the

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[6] The lack of specificity permitted the police to present their *conclusion*, where presenting the "true" *facts* would have resulted in an allegation less forceful than Allegation 3. The statement in Allegation 3, highly material that the receipt was *near*, is false. "Near", a non-specific term, as here used, implies that the receipt was in very close proximity. It was not. If Allegation 3 stated the "true" facts, *i.e.*, the body was found within bushes and shrubs (Tr. 339) and on a path commonly used by others (Tr. 373) about six feet or more from the body was found the receipt from a Master Charge account of David Wolski of 1321 Frederick Street, Naperville, Illinois, bearing the date of July 21, it would be beyond argument that there is not sufficient *linking* of defendant to the body so as to demonstrate probable cause. See also Point 2, *infra*.

[7] Allegation 4 reads:

> "That Joy E. Lewis was last observed hitchhiking on Washington Street near Bailey Road in Naperville at 8:15 p.m. on July 21, 1977."

opinion conveyed by the affidavit. *McCreary v. Sigler*, 406 F.2d 1264, 1269 (9 Cir. 1969); *People v. Ramey*, Cal. Sup. Ct. 545 P.2d 1333, 16 Cal.3d 263 (1976). Without any indication of the source of the information in Allegation 4, there was no means for the magistrate to make an independent determination of the persuasiveness and accuracy the conclusions there alleged.

The State reviewing court avoided the requirement that the source of information be stated in the affidavit by holding (a) that no source need be provided so long as the affiant (even though not relating personal observations) could be charged with perjury if the statement is not true;[8] and (b) that the rule requiring specification of the source of facts alleged applies only to non-warrant situations;[9] and (c) that the issue was waived, because, although defendant moved to suppress based on an insufficient allegation of probable cause, he failed to assert that "specific contention in the trial court." These reasons are erroneous and the record fails to support the reviewing court's conclusion.

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[8] The Appellate Court stated:

"The police officer's sworn representations of fact in the complaint were sufficiently definite so that, if false, perjury could be assigned." (App. 7a)

[9] The State reviewing court stated:

"We note, moreover, that defendant has cited no relevant authority which supports his argument. (*People v. Martin* (1977), 46 Ill. App. 3d 943, 361 N.E.2d 595 (probable cause for an arrest); *People v. Vanco* (1977), 55 Ill. App. 3d 151, 371 N.E.2d 82 (affidavit devoid of factual allegations); *People v. King* (1973), 12 Ill. App. 3d 355, 298 N.E.2d 715 (warrantless stop and search of automobile); and *People v. Damon* (1975), 32 Ill. App. 3d 937, 337 N.E.2d 262 (stop and frisk, illegal arrest) are inapposite." (App. 6a-7a)

The affidavit in support of a warrant is not sufficient merely because it is a police officer's sworn representation of fact—"sufficiently definite so that, if false, perjury could be assigned." (App. 7a) if there are not facts, so the magistrate can make an independent determination *Giordenello v. United States*, 357 U.S. 482 (1958); *Spinelli v. New York*, 393 U.S. 410 (1969).

The State reviewing court's position, that the requirement of "underlying facts and source" only applies to non-warrant situations, is absurd. *Cf. Aguilar v. Texas*, 378 U.S. 108 (1964).

And the issue was raised. Defendant moved to quash the warrant, asserting:

* * *

> "The complaint for search warrant contained insufficient facts to find probable cause * * *; (SC. 13)

The trial court denied the motion to suppress, stating that the warrant was based on sufficient facts. (CS. 30) The error was preserved in the motion for new trial.[10]

As demonstrated above, the affidavit in support of the warrant contains conclusions, not facts, and fails to satisfy the Fourth Amendment.

The affidavit fails to satisfy the Fourth Amendment requirement that it demonstrate probable cause and not mere suspicion. *Beck v. Ohio*, 379 U.S. 89; *Brinegar v. United States*, 338 U.S. 160; *Sibron v. New York*, 392 U.S. 40 (1968).

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[10] The State, in the Appellate Court, never raised any waiver argument.

What was presented to the magistrate is that at some time before or after deceased was last seen alive at 8:15 p.m. on July 21, 1977, a credit card receipt on defendant's account for a purchase on that date was discarded and was found somewhere near the body of deceased. The State admits there was not probable cause to arrest defendant.

> "If the search had not revealed any incriminating evidence * * * the police would have departed the residence without arresting the defendant *since there would not have been any evidence to support that arrest.*" (St. Br., p. 32) (Emphasis added.)

Although certain intrusions may require less justification than that necessary to justify an arrest, *Terry v. Ohio*, 392 U.S. 1, the evidence justifying a search of a man's house based on belief that he committed a crime, must be sufficient to justify his arrest. There is no greater invasion than the "ransacking of a man's house". *Cf. Payton v. New York*, ... U.S. ....., 100 S.Ct. 1371 (1980).

In a most candid statement, the State explains why the warrant was obtained, as follows:

> "Investigation had not eliminated defendant from suspicion and no further information could be obtained except by confrontation with the defendant in some way." (St. Br., p. 20)

The State's position—that where there is suspicion and further investigation would not eliminate it, the police are justified in obtaining a warrant to search and seize—is but another way of asserting that a search is justified where it is good police work—a position often refuted by the Court. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Mincey v. Arizona*, 437 U.S. 385; *United States v. Chadwick*, 443 U.S. 1, (1977).

* * *

The affidavit in support of the warrant satisfied neither the "more than suspicion" requirement of probable cause, nor the requirement that the magistrate be provided with facts upon which he can make an independent determination. The search conducted pursuant to the warrant violated the Fourth Amendment.

2.

The affidavit for the warrant affirmatively misstates facts and is invalid under *Franks v. Delaware*, 438 U.S. 154 (1978).[11]

The affidavit for the warrant stated, "That near the body was also a receipt from a Master Charge account of David N. Wolski." This statement, highly material, is false. "Near", a non-specific term, as here used, implies that the receipt was in very close proximity. It was not. It was found some six feet or more from the body (Tr. 354), *on the path (Tr. 354) commonly used by others.* (Tr. 373) This was known by the police when the term "near" was deceptively used. Officer Alsup, the affiant, found the receipt. (Tr. 354)

The deceptively false material statement violates the Fourth Amendment. *Franks v. Delaware*, 438 U.S. 154 (1978).

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[11] This issue was raised in appellant's original Brief, pp. 20 and 28, but was not considered by the State reviewing court. Though this issue was not raised in the trial court, this cannot be considered waiver, because the prevailing law in Illinois at the time of trial (Jan. 1978) was *People v. Bach*, 45 Ill. 2d 140, which prohibited going behind the four corners of the warrant. The decision of this Court in *Franks v. Delaware*, 438 U.S. 154, was not rendered until June 26, 1978. Hence, failure to raise this constitutional issue at trial should not be "waiver." *Grosso v. United States*, 390 U.S. 62 (1968); *Plazda v. United States*, 291 F.2d 56 (9th Cir. 1961).

3.

Where there is not evidence sufficient to support defendant's arrest, seizing the defendant outside his house and bringing him into his house and interrogating him, is an arrest and cannot be justified "so as to prevent the defendant from interfering with the search within the house"; and a statement obtained during the illegal arrest must be suppressed.

Confronted with the State's admission that at the time defendant was seized outside his house, brought into his house and interrogated, there was not sufficient probable cause for the defendant's arrest, *i.e.*,

> "If the search had not revealed any incriminating evidence such as was described in the search warrant, it is clear that the police would have departed the residence without arresting the defendant *since there would not have been any evidence to support that arrest.*" (St. Br., p. 32) (Emphasis added.),

the State reviewing court avoided the holding required by *Dunaway v. New York*, 442 U.S. 200 (1979), and *Brown v. Illinois*, 422 U.S. 590 (1975), that defendant's statement must be suppressed if his arrest was illegal, erroneously holding that the "detention" of the defendant was not an "*arrest.*" (App. 10a) This holding is constitutionally impermissible.

Defendant *was* under arrest when, at 12:30 a.m., he drives into his driveway, a car drives in behind him, blocking his car, (Tr. H. 20); police officers with drawn guns place him against the car and search him, (Tr. 89); he is made to put his hands on the hood of the car, (Tr. 20); he is read *Miranda*-type warnings, (Tr. H. 21, 72-73); and not allowed to leave, (Tr. H. 14, 73-74); and he is moved inside his house and ordered to sit in a secured area of the living room, (Tr. H. 74-77), where he is interrogated. (Tr. H. 74-78)

His "arrest" for interrogation cannot be justified "in order for the police to execute the search of his person authorized by the search warrant," (App. 10a), because, "defendant was searched as soon as he got out of his car." (App. 10a) Once the authorized search of defendant was completed, holding him for investigation and interrogation violated his constitutional rights. The further seizure of defendant cannot be justified to "preserve the scene and to secure the safety of the officers conducting the search." (App. 10a) Defendant was not arrested in the premises, but outside. The police cannot justify his detention—to prevent him from interfering with their search inside the house—when it was they who brought him in. The police cannot expand their authority to detain by moving the apprehended person for their benefit. *Cf., Vale v. Louisiana*, 399 U.S. 30 (1970); *Chimel v. California*, 395 U.S. 752 (1969).

Defendant was arrested and, as admitted by the State, his arrest was *without probable cause.*

Defendant's initial statement was obtained within one hour of his illegal arrest; his further statement was obtained one hour after the initial statement. During this entire time, defendant was in custody of the same officers or their associates; there was continued attempt to interrogate defendant from the time of defendant's arrest. The taint of the initial illegality was never attenuated. *Brown v. Illinois*, 422 U.S. 590 (1975); *Dunaway v. New York*, 442 U.S. 200 (1979).

The statement was obtained in violation of defendant's Fourth Amendment rights.

4.

The right to jury trial and due process is denied where the trial court refuses to instruct the jury on an affirmative defense, *i.e.*, self-defense because he personally evaluates defendant's testimony that he acted in self-defense as being unreasonable.

Petitioner's right to trial by jury and due process of law was violated because the trial judge refused to instruct on the defense of self-defense because in his opinion, defendant's belief that he had to act in self-defense was unreasonable. The trial court stated:

> "The Court: *Despite what the defendant may have testified to he believed, I don't agree there is anything in the record insofar as the facts are concerned reasonably justify anybody feeling their life was in danger of great bodily harm.* Here was a bulky man weighing 265, and she weighed 120, and all he received was a couple of *kicks in the groin*, and under all those circumstances and other circumstances alluded to by the State's Attorney, I don't think there is any legitimate question of fact on that to present to the jury, so I am sustaining the objections to the giving of that instruction. *Again, it is what a reasonable person would believe under the circumstances not just the defendant's belief.*"[12] (Tr. 876-877) (Emphasis added.)

It is constitutionally impermissible for a trial court to refuse to give an instruction on a defendant's affirmative

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[12] Under the Illinois statutory scheme, a person can be guilty of voluntary manslaughter either if defendant is "acting under a sudden intense passion resulting from serious provocation" Chap. 38, Sec. 9-2(a), or "if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code [(said Article sets out the affirmative defenses such as self-defense, defense of others, defense of dwelling)] but his belief is unreasonable." Chap. 38, Sec. 9-2(b). Here, the trial court did instruct pursuant to Sec. 9-2(a), but did not instruct as to Sec. 9-2(b).

defense or on a lesser included offense because the court personally evaluated the evidence. "So long as there is some evidence . . . , the proper weight to be given is for the jury to determine" *Stevenson v. United States*, 162 U.S. 314 (1896). *Beck v. Alabama*, ... U.S. ..... 65 L.Ed. 2d 392 (1980); *Zemina v. Solom*, 573 F.2d 1027 (1978).

The State reviewing court affirmed by evaluating the evidence and erroneously concluding that the record is "devoid of evidence of self-defense." (App. 11a-13a) This is not true.

Defendant testified that deceased originally tried to rob him (Tr. 742-743); that after he prevented such initial attempt she solicited a sexual encounter (Tr. 744); that after enticing him, she began to attack him, kicking him twice in the groin (Tr. 746); that to prevent further attack, in defense of himself, "while she was attempting to kick me, punch me or scratch my face," (Tr. 804), he hit her with his fist and when this would not prevent her continued attack, he hit her once with the pipe. (Tr. 747) His testimony as to the extent of the kicks in the groin is corroborated: *his* blood was on *his undershorts.* (Tr. 636)

The State reviewing court rejected the position that the bloody shorts corroborated the claim of self-defense:

> "There is no evidence in the record, nor did defendant suggest in his testimony, that any conduct of the deceased caused him *pain*, injury or bleeding." (App. 12a) (Emphasis added.)

Not true. Defendant testified that as he was attempting to get on top of her after she had solicited him to do so, then suddenly:

> "she kicked me hard in the groin . . .
> Q. Dave, did that first kick she kicked you with before she said anything, did that hurt you?
> A. *Yes, I was in a lot of pain.*
> Q. *Did the second kick hurt you?*
> A. *Yes.*" (Tr. 746) (Emphasis added.)

And as that statement of the Appellate Court is not true, so is its conclusion that there is no evidence that defendant acted in self-defense. His further testimony is that after twice being kicked in the groin, he hit her with his left fist on the face, (Tr. 746-747); ". . . she fell back on the seat and then continued to struggle and attempt to kick me (Tr. 747) And there was a piece of steel . . . on the floor, and I picked it up and hit her with it at that time." (Tr. 747) This is evidence that defendant, having been twice kicked in the groin, which caused him to "be in a lot of pain," (Tr. 746), and in order to prevent his being kicked again, hit her with the iron pipe. (Tr. 747) This is testimony requiring the giving of a self-defense instruction. The court's refusal denied defendant due process and his right to a jury trial. *Stevenson v. United States*, 162 U.S. 314 (1896); *Beck v. Alabama*, ... U.S. ..... 65 L.Ed.2d 392 (1980).

5.

The Illinois Courts' application of the "farce or sham" standard in evaluating the quality of petitioner's representation abridged petitioner's Fourteenth Amendment rights to the effective assistance of counsel and equal protection of the laws.

The "farce or sham" test is not a constitutionally permissible standard for review of ineffective assistance of counsel claims.

Petitioner contended in the Illinois Appellate Court that he was entitled to reversal of his conviction because of incompetence of his trial counsel. The Appellate Court noted that "[t]he standard applied in Illinois to judge the competence of retained counsel is whether the caliber of representation was so low as to amount to no representation at all or to reduce the court proceedings to a farce or sham." (App. 14a) The petitioner's claim was rejected on the ground that "the representation afforded to defendant did not violate that standard." *Id.* The petitioner's conviction cannot stand because the "farce or sham"

standard applied to petitioner's claim by the Illinois court is constitutionally infirm. Effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments requires a higher caliber of representation than that implied in the "farce or sham" test. This is clearly indicated in *McMann v. Richardson*, 397 U.S. 759 (1970), where this Court, noting that "defendants cannot be left to the mercies of incompetent counsel," 397 U.S. at 771, declared that a guilty plea made on advice of counsel is open to attack if counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." *Id.*

The United States Courts of Appeal in ten of the eleven circuits have clearly rejected the "farce or sham" test and its equivalents.[13]

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[13] First Circuit—*United States v. Bosch*, 584 F.2d 1113 (1 Cir. 1978);

Third Circuit—*Moore v. United States*, 432 F.2d 730 (3 Cir. 1970);

Fourth Circuit—*Marzullo v. Maryland*, 561 F.2d 540 (4 Cir. 1977); *Coles v. Peyton*, 398 F.2d 224 (4 Cir. 1968), *cert. denied*, 393 U.S. 849;

Fifth Circuit—*Herring v. Estelle*, 491 F.2d 125 (5 Cir. 1974); *Mac Kenna v. Ellis*, 280 F.2d 592 (5 Cir. 1960), *modified*, 289 F.2d 928 (5 Cir. 1961), *cert. denied*, 386 U.S. 877;

Sixth Circuit—*Beasley v. United States*, 491 F.2d 687 (6 Cir. 1974);

Seventh Circuit—*United States ex rel. Williams v. Twomey*, 510 F.2d 634 (7 Cir. 1975);

Eighth Circuit—*United States v. Easter*, 539 F.2d 663 (8 Cir. 1976);

Ninth Circuit—*Cooper v. Fitzharris*, 586 F.2d 1325 (9 Cir. 1978), *cert. denied*, 440 U.S. 974;

Tenth Circuit—*Dyer v. Crisp*, 613 F.2d 275 (10 Cir. 1980);

District of Columbia Circuit—*United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973).

(Footnote continued on following page)

The "farce or sham" test is so opposed to the overwhelming weight of current Sixth Amendment jurisprudence that this Court cannot suffer it to be applied to deny defendant his constitutional right to the effective assistance of counsel.

Petitioner was deprived of the equal protection of the laws because the quality of his representation by *retained* counsel was evaluated by the "farce or sham" standard, while the quality of representation by *appointed* counsel is evaluated according to a different, higher standard.

The Illinois courts adopt different standards for evaluating the effectiveness of counsel's representation depending on whether counsel was retained or appointed.

> "Where the defendant selects his own attorney * * * that the failure of such counsel to exercise care and skill in the trial of the case does not afford a basis for reversing a judgment of conviction.
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> * * *
>
> * * * [h]owever, in those cases where the defendant is represented by court-appointed counsel * * * [it is] the duty of the trial court to see that counsel is assigned who has sufficient ability and experience to fairly represent the defendant, present his defense and protect him from undue oppression." *People v. Morris*, 3 Ill.2d 437, 444-45, 121 N.E.2d 810, 815 (1954).

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[13] *continued*

In the Second Circuit, in *Brinkley v. Lefevre*, 621 F.2d 45 (2d Cir. 1980), the issue of whether the "farce and mockery" standard should be abandoned was not reached, because the majority found no Sixth Amendment violation regardless of what alternative standard ought to apply. 621 F.2d at 47. A strong dissenting opinion urged immediate consideration of the issue in order to articulate a proper standard for evaluating criminal representation. *Id.* at 47-48.

The farce or sham test, applicable to private counsel, *People v. Murphy*, 72 Ill.2d 421, 381 N.E.2d 677 (1978), is inapplicable to appointed counsel. *People v. Hainline*, 77 Ill. App. 3d 30, 33, 395 N.E.2d 1224, 1227 (1979).

Application of the "farce or sham" test, thus affording the petitioner less protection against prejudice resulting from incompetent retained counsel than he would have enjoyed had he been an indigent for whom counsel would have been appointed is constitutionally impermissible. *Cuyler v. Sullivan*, ... U.S. ....., ..., 100 S.Ct. 1708, 1716 (1980).

There is ineffective assistance of counsel here, because of lack of preparation and "unawareness" of a rule of law basic to the case. *People v. Ibarra*, 60 Cal.2d 460, 386 P.2d 487 (1963); *Wolf v. Briton*, 509 F.2d 304 (8 Cir. 1975). Here, counsel's failure to read the controlling statutes caused him to fail to request an instruction on voluntary manslaughter. Under the Illinois statutory scheme, a person can be guilty of voluntary manslaughter and not murder if, when he kills, he believes he is acting in self-defense, but his belief is unreasonable. Chap. 38, Sec. 9-2(b).

Hence, even if the trial court was correct in concluding that defendant's belief that he had to act in self-defense was unreasonable; once the court having concluded that defendant had such a belief, defendant had a right to have the jury instructed on the lesser included offense of voluntary manslaughter. He and his lawyer desired that the jury be instructed on a lesser included offense; counsel requested an instruction on the lesser included offense of voluntary manslaughter (murder reduced if the killing is by provocation). Chap. 38, Sec. 9-2(a). Hence, the failure specifically to request the instruction on voluntary manslaughter as defined as "unreasonable self-defense" must be because the lawyer failed to read the statute.

Further evidence of ineffective assistance of counsel is the attorney's substantial *voir diring* of the jurors as to how they would respond to psychiatric expert testimony (Tr. 43, 55-57, 66-67, 84-85, 115-116, 138, 170, 171, 216, 217, 224-225, 233, 280, 294-295), where his intent was to introduce such expert evidence on the "credibility of defendant's confession" (Tr. 707-705), where the most superficial research[14] would demonstrate that such testimony is inadmissible on the issue of "credibility of the confession." *Voir diring* the jury improperly prejudiced the defendant by destroying his credibility in the eyes of the jury, and because the jury selection by the lawyer was based upon an irrelevant issue.

Defense counsel was unprepared, and could not and did not render effective assistance of counsel.

CONCLUSION

Petitioner requests grant of a Petition for Writ of Certiorari.

Respectfully submitted,

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[14] *People v. Slago*, 58 Ill. App. 3d 1009, 374 N.E.2d 1270; *People v. Hester*, 39 Ill. 2d 489, 237 N.E.2d 466. He made no effort to do so.

APPENDIX A

(No. 78-306—Filed March 24, 1980)

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

DAVID A. WOLSKI,

Defendant-Appellant.

Appeal from the 16th Judicial Circuit,
Kendall County, Illinois.

MR. JUSTICE NASH delivered the opinion of the court:

After trial by jury defendant, David A. Wolski, was convicted of murder (Ill. Rev. Stat. 1977, ch. 38, par. 9-1(a)(2)) and was thereafter sentenced to a term of 20 to 25 years imprisonment.

He brings this appeal asserting numerous grounds of error: (I) that the warrant for a search of his person, house and automobile was issued without probable cause and should have been quashed and the articles seized thereunder suppressed; (II) that his inculpatory statements to investigating officers should have been suppressed; (III)

that the trial court erred in failing to instruct the jury on self-defense and on voluntary and involuntary manslaughter; (IV) that he lacked effective assistance of counsel; (V) that two prospective jurors should have been excused for cause; (VI) that testimony as to defendant's reputation, and (VII) the victim's alleged character trait for violence, was improperly excluded; (VIII) that his statement to the police was erroneously characterized as a confession in the instructions; and (IX) finally, that his conviction should be reduced to manslaughter or the sentence imposed for murder be reduced.

The body of Joy E. Lewis, age 14, was found on July 22, 1977, in underbrush approximately 60 feet from Hafenrichter Road on a farm in Kendall County. The body was not clothed below the waist and large quantities of blood were found within a radius of three to four feet from it; the girl had suffered multiple blows to the head, crushing her skull and causing death. A Master Charge sales slip dated July 21, 1977, in defendant's name and signed by him, was found about six feet from the body. The remaining evidence introduced at trial consisted substantially of clothing belonging to defendant, the purported murder weapon, inculpatory pre-trial statements attributed to defendant, and his own testimony in the course of trial.

Defendant's testimony in trial differed little from his pre-trial statements to the investigating police officers. As given in evidence both disclosed that about 7 p.m. on July 21, 1977, defendant drove from his home in Naperville to pick up a television set from a friend's house. While en route he picked up a hitchhiker, subsequently determined to be the decedent, Joy E. Lewis, who asked to be driven to her brother's apartment in Aurora, and

defendant agreed to do so. In Aurora, however, although defendant followed her directions they were unable to find the apartment. He stated that she giggled and talked continuously and that at one point she suddenly aimed her purse at him as if it contained a gun and instructed him to drive out on a country road. He complied, but after stopping the car he said he managed to grab the purse and discovered then that it did not contain a gun. In his statement to the investigating officers defendant said that he "made a pass at her", but in his testimony at trial he stated that it was the girl who suggested that they have sexual relations. This is the only essential difference between defendant's pre-trial and in-trial accounts of this incident.

Defendant stated that when he unzipped his trousers and turned to her a struggle began in which she struck him in the groin with her knee and tried to scratch his face; he said he hit her with his fist to stop the struggle and struck her head with a steel rod that had been laying on the floor of his car. She then fell limp and he removed her from the car; he was uncertain whether or not he hit her again outside the car with the steel bar. Defendant stated he threw her belongings, a purse, radio and camera, from the car and, although he noticed his Master Charge receipt had fallen to the ground, he drove away from the scene without retrieving it. Defendant told the investigating officers that he disposed of the steel bar by throwing it into a field away from the scene; it was subsequently recovered by police officers following his directions.

Defendant stated he then drove to a gas station where he washed blood from his hands, completed the errand to his friend's house and returned home. At home he changed

his clothing and placed his bloodstained undershorts in a bathrobe pocket.

Based upon the complaint and affidavit of an investigating police officer a judge issued a warrant on July 22, 1977, for the search of defendant's person, home and automobile for evidence of the murder. Defendant was not at home when the officers first arrived for the purpose of executing the warrant but he came shortly thereafter in his automobile. The officers exhibited the search warrant to defendant, informed him that he was a suspect in a homicide case, advised him of his *Miranda* rights and proceeded to carry out the search as directed by the warrant. As a result of this search the officers seized defendant's bloodstained undershorts in the house and seized from his automobile samples of hair which were later determined to have the same characteristics as the decedent's hair.

Defendant thereafter gave a detailed statement relating his contact with the decedent.

I.

Defendant contends first that the warrant issued for the search of his person, house and automobile, failed to satisfy the requirements of the Federal and Illinois constitutions and section 108-3 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1977, ch. 38, par. 108-3). He asserts the search warrant should have been quashed as defective on these grounds:

A) that the complaint and affidavit for the search warrant did not establish probable cause;

B) that the complaint failed to list the items to be seized; and

C) that it contained unexplained handwritten additions.

A.

A complaint and affidavit for the issuance of a search warrant must be considered by the issuing judge and reviewing court in a common-sense, realistic fashion (*People* v. *McGrain* (1967), 38 Ill. 2d 189, 230 N.E.2d 699), and great deference should be paid to the issuing judge's determination of probable cause (*Spinelli* v. *United States* (1969), 393 U.S. 410, 419, 21 L. Ed. 2d 637, 645, 89 S. Ct. 584, 590). Our supreme court has held that the probable cause required for the issuance of a search warrant has two dimensions: first, facts must be related which would cause a reasonable man to believe a crime has been committed; second, facts must be set forth which would cause a reasonable man to believe that evidence of the crime is in the place to be searched. *People* v. *George* (1971), 49 Ill. 2d 372, 274 N.E.2d 26; *People* v. *Francisco* (1970), 44 Ill. 2d 373, 255 N.E.2d 413.

The complaint and affidavit in this case, signed under oath by one of the investigating police officers, alleged in relevant part:

"1. That on the 22nd day of July, the dead body of one Joy E. Lewis was discovered in a wooded area adjacent to Hafenrichter Road near the intersection of Hafenrichter Road and U.S. Route 34 in Kendall County.

2. That a 2 x 4 board with protruding nails was found near the body of Joy E. Lewis with blood thereon, which board apparently inflicted the mortal wounds.

3. That near the body was also a charge receipt from a Master Charge account of one David N.

[sic] Wolski of 1321 Frederick Street, Naperville, IL bearing a date of July 21, 1977.

4. That Joy E. Lewis was last observed hitchhiking on Washington Street near Bailey Road in Naperville at 8:15 p.m. on July 21, 1977.

5. That the residence of David N. [sic] Wolski, 1321 Frederick Street is near the point of last observation of Joy E. Lewis and is approximately 1 to 1½ miles therefrom."

We are satisfied, contrary to defendant's argument, that the complaint established probable cause. The first and second factual allegations establish the probability that a homicide had taken place. The third allegation would lead a reasonable person to believe evidence of the crime could be found in the places sought to be searched; the sales receipt, bearing so recent a date and found near the body, established the probability that defendant was linked to the offense so as to reasonably permit the search for which authorization was sought. See *People* v. *Weinger* (1978), 63 Ill. App. 3d 171, 379 N.E.2d 810.

Defendant also suggests the form of the complaint was defective in that it failed to specify the source of each fact alleged in it. This contention is waived on appeal as defendant failed to raise it at the hearing of his motions to quash the search warrant and suppress the evidence; nor was it preserved by the general averment in his post-trial motion that the complaint contained insufficient facts to establish probable cause. (*People* v. *Pickett* (1973), 54 Ill. 2d 280, 296 N.E.2d 856; *People* v. *Limas* (1977), 45 Ill. App. 3d 643, 359 N.E.2d 1194.) We note, moreover, that defendant has cited no relevant authority which supports his argument. (*People* v. *Martin* (1977), 46 Ill. App. 3d 943, 361 N.E.2d 595 (probable cause for an arrest); *People*

v. *Vanco* (1977), 55 Ill. App. 3d 151, 371 N.E.2d 82 (affiidavit devoid of factual allegations); *People* v. *King* (1973), 12 Ill. App. 3d 355, 298 N.E.2d 715 (warrantless stop and search of automobile); and *People* v. *Damon* (1975), 32 Ill. App. 3d 937, 337 N.E.2d 262 (stop and frisk, illegal arrest) are inapposite. The police officer's sworn representations of fact in the complaint were sufficiently definite so that, if false, perjury could be assigned (*People* v. *Bak* (1970), 45 Ill. 2d 140, 258 N.E.2d 341; *Franks* v. *Delaware* (1978), 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674), and the warrant will not be quashed on the basis urged by defendant.

B.

Defendant also argues that the complaint was defective in that it failed to list any of the items to be searched for and seized, and he takes exception to the search warrant's broad authorization of seizure of "articles of clothing with blood or male or female secretions thereon."

Article I, section 6 of the Illinois Constitution and section 108-3 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1977, ch. 38, par. 108-3) require that a complaint for a search warrant describe with particularity the "place or person, or both, to be searched and the things to be seized." The purpose of that requirement is to prevent the issuance of general search warrants. *People* v. *Elias* (1925), 316 Ill. 376, 147 N.E. 472; *People* v. *Holmes* (1974), 20 Ill. App. 3d 167, 312 N.E.2d 748.

The complaint in this case sought authorization to seize "the following instruments, articles and things which have been used in the commission of, or which constitute evidence of, the offense of murder", but it did not further

describe in greater detail the items to be seized. The search warrant, however, did describe the items which could be seized under its authority: "blood, articles of clothing with blood or male or female secretions theron [sic], jewelry and other personal items formerly in possession of Joy E. Lewis, hair from the head of Joy E. Lewis, dirt, grass on [sic] other materials or things from the area where the body of Joy E. Lewis was found. fingerprints [sic] of Joy E. Lewis." The record discloses that both the complaint and warrant were drafted by the same persons and were presented simultaneously to the issuing judge who affixed his signature to both documents.

It has been held that, in accordance with sound legal practice, the issuing judge may be presumed to have read both the warrant and accompanying complaint before issuing the search warrant. (*People* v. *Mays* (1974), 25 Ill. App. 3d 435, 323 N.E.2d 409 (abstract).) Under the circumstances of this case, therefore, we see no error in the trial court's ruling on this point. The failure of the complaint to specify the items to be seized, while not a practice to be encouraged, was in the nature of a technical defect not affecting the substantial rights of the accused (Ill. Rev. Stat. 1977, ch. 38, par. 1018-14) and did not constitute a basis for quashing the search warrant or suppressing the evidence seized thereunder. The warrant described the items to be seized with as much exactitude as was possible at that stage of the investigation (see *People* v. *Raicevich* (1978), 61 Ill. App. 3d 143, 377 N.E.2d 1266), and sufficiently limited the discretion to be exercised by the officers in conducting the search. (See *People* v. *Prall* (1924), 314 Ill. 518, 145 N.E. 610; *People* v. *Sovetsky* (1931), 343 Ill. 583, 175 N.E. 844.) The present case must be distinguished from *People* v. *Prall* and *People* v. *Bishop*

(1979), 71 Ill. App. 3d 52, 388 N.E.2d 1144, referred to by defendant, wherein the warrants themselves failed to describe the items to be seized.

C.

Defendant also objects to certain handwritten interlineations on the face of the typewritten complaint and in the body of the search warrant, and suggests the warrant was thereby invalidated. To the complaint was added: "10. The dead body was nude from the waist down and appeared to be sexually molested", initialed by the affiant officer; to the warrant was added "[clothing with blood] or male or female secretions" and "fingerprints of Joy E. Lewis", both items clearly initialed by the issuing judge. These alterations did not affect the substantial rights of defendant. (See *People* v. *Fitzgerald* (1975), 35 Ill. App. 3d 58, 340 N.E.2d 591.) We find no parallel between these facts and those in *People* v. *West* (1977), 48 Ill. App. 3d 132, 362 N.E.2d 791, relied on by defendant, wherein the issuing judge materially altered the search warrant pursuant to the "unsworn, factually unsupported oral speculation" of a police officer not the affiant in the complaint. 48 Ill. App. 3d at 135, 362 N.E.2d at 794.

Defendant next contends that the inculpatory statement he gave to the investigating officers at the police station

II.

should have been suppressed and asserts, first, that it was the fruit of a warrantless arrest made without probable cause. His argument is grounded on a claim that he was illegally placed under arrest when he first encountered the officers on alighting from his car on the driveway to his house, and that at that moment the arresting officers

did not have enough facts or evidence to constitute probable cause that defendant had committed an offense. At the hearing of his motion to suppress defendant testified that officers informed him at that time he was under arrest; three officers who were present during the search testified, however, that defendant had not been placed under arrest before the search of his home disclosed his bloodstained undershorts. Testimony further disclosed that defendant was searched as soon as he got out of his car and he was then taken into the house where he was instructed to remain in a chair while the search of his house and car were carried out.

An arrest is effected by "an actual restraint of the person or by his submission to custody." (Ill. Rev. Stat. 1977, ch. 38, par. 107-5(a).) Defendant's argument, that the initial restraint of his person amounted to an illegal arrest requiring suppression of his statement defies logic. He must necessarily have been reasonably restrained in order for police officers to execute the search of his person authorized by the search warrant. As defendant was lawfully restrained under the authority of the search warrant, that restraint cannot form a basis for suppression of the fruits of the search or of his subsequent arrest.

We note further that section 108-9 of the Criminal Procedure of 1963 (Ill. Rev. Stat. 1977, ch. 38, par. 108-9) approves detention of persons on the premises to be searched in order to preserve the scene and to assure the safety of the officers conducting the search. It is apparent the restraint and search of defendant was carried out at the earliest opportune moment. See *People* v. *One 1968 Cadillac Automobile VIN #J8316714* (1972), 4 Ill. App. 3d 780, 281 N.E.2d 776.

The second prong of defendant's argument for the suppression of his statement is that he did not make a knowing and voluntary waiver of his rights under *Miranda* v. *Arizona* (1966), 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602. We cannot agree. It is undisputed in the record that defendant was twice fully advised of his rights, the first time before any questioning, and he acknowledged this fact in his own testimony. He also testified at trial that he did in fact understand his *Miranda* rights and had voluntarily waived them. While he suggests now on appeal that he did not knowingly and voluntarily waive his rights, we are unimpressed by his present argument in light of his testimony at trial.

We find that the trial court correctly refused to suppress defendant's statement and that defendant's response to an inquiry from a police officer as to whether he wished to waive his rights, "I don't wish to but I certaining [sic] will," does not require a contrary finding.

III.

Defendant next contends that the trial court erred in failing to instruct the jury as to voluntary manslaughter (Ill. Rev. Stat. 1977, ch. 38, par. 9-2(b)), and self-defense (Ill. Rev. Stat. 1977, ch. 38, par. 7-1), and involuntary manslaughter (Ill. Rev. Stat. 1977, ch. 38, par. 9-3). Defendant's tendered instructions relating to the latter two subjects were refused by the trial court; no instruction on voluntary manslaughter was tendered by him, however, so he has waived consideration of that question on appeal. *People* v. *Roberts* (1979), 75 Ill. 2d 1, 387 N.E.2d 331.

Initially we address the question whether there was "some evidence" of self-defense presented at trial, in accordance with section 3-2(a) of the Criminal Code of

1961 (Ill. Rev. Stat. 1977, ch. 38, par. 3-2(a)), and based on the record before us we agree with the trial court's refusal to instruct on self-defense. In his statement to the police defendant said he had attempted sexual relations with the decedent and that she thereupon struck him in the groin with her knee, an action which "startled" him. He further acknowledged that although she hit him in the face with her fist, "it wasn't much of a, of a blow." Defendant then hit her on the head with a 2½ lb., 11½" long steel bar while positioned on top of her on the front seat of his car; he was 26 years old, a veteran, and weighed approximately 265 pounds while decedent was 14 years old and weighed about 120 pounds. Responding to a question during his post-arrest interrogation as to whether he again struck decedent outside the car, defendant said "I don't recall doing it. I, I just say I must have because there was, there was blood all over me, my hands."

As evidence of self-defense, defendant points to his undershorts, stained with blood of his own type, not of decedent's. We find this insufficient to lend support to his claim of self-defense. There is no evidence in the record, nor did defendant suggest in his testimony, that any conduct of decedent cause him pain, injury or bleeding. The bloodstains on his clothing are generally unexplained and it cannot be determined from the record when they occurred.

As the record is devoid of evidence of self-defense, the trial court need not have instructed as to that issue. (See *People* v. *Allen* (1972), 50 Ill. 2d 280, 278 N.E.2d 762.) For the same reasons we reject defendant's argument that the trial court should have instructed *sua sponte* on voluntary manslaughter. *People* v. *Wilkins* (1976), 36 Ill. App. 3d 761, 344 N.E.2d 724.

In support of his contention that the trial court erred in refusing his tendered instruction on the lesser included offense of involuntary manslaughter, defendant theorizes that a jury might have found he hit Joy Lewis only once, and was merely reckless in leaving her lying injured at the roadside where some unknown person killed her. Where there is some evidence in the record which, if believed by a jury, would reduce the crime to involuntary manslaughter, a defendant is entitled to an instruction defining the lesser included offense if he so requests (*People* v. *Joyner* (1972), 50 Ill. 2d 302, 306, 278 N.E.2d 756, 759), but such evidence is lacking in this case.

Recklessness in the performance of an act is an essential element of the offense of involuntary manslaughter. (Ill. Rev. Stat. 1977, ch. 38, par. 9-3.) The offense is also characterized by the absence of an intent to kill or inflict injury. (Ill. Rev. Stat. 1977, ch. 38, par. 9-3; *People* v. *Farmer* (1977), 50 Ill. App. 3d 111, 365 N.E.2d 177.) Defendant's own description of the incident militates against a finding that he acted recklessly or lacked the requisite knowledge for a finding of murder (Ill. Rev. Stat. 1977, ch. 38, par. 9-1(a)(2)); to the contrary, his acknowledged conduct in striking the girl on the head with a steel bar can only be viewed as deliberate and volitional. He stated he believed she was dead when he left the scene. The trial court therefore correctly refused defendant's tendered instruction on involuntary manslaughter. See *People* v. *Cannon* (1971), 49 Ill. 2d 162, 273 N.E.2d 829; *People* v. *Latimer* (1966), 35 Ill. 2d 178, 220 N.E.2d 314; and *People* v. *Boisvert* (1975), 27 Ill. App. 3d 35, 325 N.E. 2d 644.

For these same reasons, we also decline to reduce defendant's murder conviction to either voluntary or involuntary manslaughter.

IV.

Defendant next contends that he lacked effective assistance of counsel at trial because his attorney was incompetent. The standard applied in Illinois to judge the competence of retained counsel is whether the caliber of representation was so low as to amount to no representation at all or to reduce the court proceedings to a farce or sham. (*People* v. *Murphy* (1978), 72 Ill. 2d 421, 381 N.E. 2d 677; *People* v. *Anderson* (1978), 65 Ill. App. 3d 783, 382 N.E.2d 866.) From our examination of the record we find the representation afforded to defendant did not violate that standard.

As evidence of his attorney's incompetence, defendant points to his failure to request a voluntary manslaughter instruction. We find no prejudice to defendant by this omission, however, for his previously tendered self-defense instruction was correctly refused on the ground that there was no evidence of self-defense; in that light, it would have been a meaningless act to seek a voluntary manslaughter instruction based on unreasonable self-defense, the only remotely possible version of voluntary manslaughter under this evidence.

Defendant also maintains that his attorney "floundered" in his attempts to introduce testimony of character witnesses; that his counsel failed to know defendant's statement was an admission and not a confession; and that his final argument consisted of "organized ramblings." To the contrary, defendant's attorney did successfully introduce character testimony; defendant's statement was indeed a confession, not merely an admission; and we do not agree with his characterization of his counsel's closing argument.

Finally, contrary to defendant's argument, we do not believe defense counsel's voir dire examination of prospective jurors regarding psychiatry and psychiatric testimony, when he later failed to offer such testimony, rendered the trial a farce or sham.

V.

Defendant contends next that the trial court erred in refusing to challenge for cause two prospective jurors who were former clients of the prosecutor, thereby forcing defendant to use his peremptory challenges. He argues that these persons as jurors could not have maintained objectivity and impartiality in view of the nature of the former lawyer-client relationship and, therefore, the impairment of his right to a full allotment of challenges requires reversal. (*United States* v. *Boyd* (5th Cir. 1971), 446 F.2d 1267.) Under the circumstances of this case, however, we do not agree. The prosecutor had represented one of the prospective jurors in a real estate closing about 3 years before this trial, and had drafted the will of another prospective juror 10 years before it. Neither of the prospective jurors had employed his professional services at any other time, and both responded in their examinations that they would be impartial regardless of their prior contact with the prosecutor.

We do not find the former relationship between these jurors and the prosecutor was such as to require their exclusion for cause, particularly in that they stated under oath that it would not affect their resolution of the issues in this case. We see no prejudice to defendant in the fact that he used two peremptory challenges to exclude these jurors for, after exhausting his ten peremptories, he did not seek to challenge any remaining prospective jurors

for cause, and he does not now suggest he wished to challenge any of the last few jurors chosen to hear this case. The determination of whether a challenge for cause should be allowed rests within the sound discretion of the trial court (*People* v. *Harris* (1968), 38 Ill. 2d 552, 232 N.E.2d 721) and that discretion was not abused here.

VI.

Defendant next asserts the trial court erred in excluding certain testimony by three witnesses relating to his reputation for truth, veracity and peacefulness. Defense counsel asked one witness, Tom Zrout, about defendant's honesty, but in response to an objection, he withdrew the question without a ruling by the court. He then questioned Zrout about defendant's reputation for integrity, an objection to which was sustained. We find no error in that ruling, as Mr. Zrout's testimony later had to be stricken in its entirety when it became clear that he was inadequately acquainted with defendant's reputation. *People* v. *Moretti* (1955), 6 Ill. 2d 494, 129 N.E.2d 709.

Defense counsel also sought to elicit reputation testimony from Richard Modell, a Lisle resident who knew defendant only from defendant's visits to relatives residing in Lisle. Defendant, however, lived in Berwyn until about the time of the homicide in this case and did not move to Lisle until a week after the homicide. Modell's testimony was correctly stricken as it related to the time defendant lived in Berwyn for Modell was not familiar with defendant's reputation in that community. (*People* v. *Moretti.*) We also note that the portion of Modell's testimony which related to the period defendant resided in Lisle could have also been stricken. Evidence of character must be confined to proof of the accused's general

reputation among his neighbors and associates at or before the commission of the offense. *People* v. *Willy* (1922), 301 Ill. 307, 133 N.E. 859; *People* v. *Bascomb* (1979), 74 Ill. App. 3d 392, 392 N.E.2d 1130.

William Hoy, a co-worker of defendant, was also called to testify and when asked by counsel for defendant's "reputation in the community for violence," he replied, "I wouldn't know of any." When asked "[w]hat is [defendant's] community reputation whether you know of any or not?", Hoy replied, "I would say good." At the prosecutor's request the court struck the testimony in its entirety. Defendant now argues this was testimony as to his reputation for peacefulness to which he was entitled.

We find no error in the court's ruling. Where an accused is charged with a crime of violence, as here, evidence of his good reputation for peacefulness is relevant (*People* v. *Bridgewater* (1938), 369 Ill. 633, 17 N.E.2d 556), but one cannot, however, have a good reputation for violence. See *People* v. *Partee* (1974), 17 Ill. App. 3d 166, 308 N.E.2d 18.

VII.

Defendant next contends the trial court erred in excluding evidence that decedent had participated in fights at school. He argues that as the excluded evidence of particular acts was offered to reveal a character trait of the decedent, not her general reputation, it was relevant and admissible to establish her alleged propensity for aggression.

It is well-established that where a claim of self-defense is made, and at the time of the incident the accused knew of the victim's reputation for violence or knew of

specific violent acts by the victim, proof of such reputation or acts together with the accused's knowledge thereof is relevant and admissible to establish the reasonableness of the accused's apprehension of danger. *People* v. *Stepheny* (1970), 46 Ill. 2d 153, 263 N.E.2d 83; *People* v. *Allen* (1941), 378 Ill. 164, 37 N.E.2d 854; *People* v. *Adams* (1979), 71 Ill. App. 3d 70, 388 N.E.2d 1326; *People* v. *Ortiz* (1978), 65 Ill. App. 3d 525, 382 N.E.2d 303; *People* v. *Peeler* (1973), 12 Ill. App. 3d 940, 299 N.E.2d 382.

In arguing for the admissibility of evidence of the victim's prior conduct defendant relies in part on *People* v. *Stombaugh* (1972), 52 Ill. 2d 130, 284 N.E.2d 640, wherein our supreme court said that "evidence concerning the violent temper and disposition of the deceased and his prior threats to the defendant is admissible as tending to show the circumstances confronting the defendant, the extent of his apparent danger, and the motive by which he was influenced. Such circumstances are relevant in that they tend to show the defendant's state of mind. *People* v. *Davis* (1963), 29 Ill. 2d 127, 129, 130 [other citations omitted].)" 52 Ill. 2d at 139, 284 N.E.2d at 645.

The *Davis* opinion upon which the *Stombaugh* court relied clearly qualified, however, the admissibility of evidence of a decedent's character trait by stating it must be a trait of which defendant was aware at the time of the killing. (29 Ill. 2d 127 at 130, 193 N.E.2d 841 at 843.) The *Stombaugh* decision did not purport to overrule *Davis* in this regard. Thus the law in Illinois still requires the exclusion of evidence of a victim's propensity for aggression unless the accused knew the victim had that trait. To the extent that they suggest a departure from this rule, we do not follow *People* v. *Robinson* (5th Dist. 1977),

56 Ill. App. 3d 832, 371 N.E.2d 1170; *People* v. *Montgomery* (1st Dist. 1977), 51 Ill. App. 3d 324, 366 N.E.2d 623; and *People* v. *Baer* (1st Dist. 1976), 35 Ill. App. 3d 391, 342 N.E.2d 177.

We therefore find the trial court correctly excluded that testimony. Decedent was a hitchhiker first seen by defendant on the day of her death; they were strangers to each other and he had no prior knowledge of her character.

VIII.

Defendant further contends the trial court improperly instructed the jury by Illinois Pattern Instruction, Criminal, No. 3.07, that defendant made a confession. He argues the statement he gave to the investigating police officers was at most an admission, not a confession to murder, as it raised issues of self-defense or provocation. Since defendant made no objection in trial to the instruction the issue is waived. (*People* v. *Roberts* (1979), 75 Ill. 2d 1, 387 N.E.2d 331; *People* v. *Mallett* (1970), 45 Ill. 2d 388, 259 N.E.2d 241.) We decline to consider this issue as plain error under Supreme Court rules 451(c) and 615(a) (Ill. Rev. Stat. 1977, ch. 110A, pars. 451(c) and 615(a)), as on examination of the statement we have determined that it cannot fairly be said to raise issues of self-defense or provocation (*People* v. *Weeks* (1976), 37 Ill. App. 3d 41, 344 N.E.2d 791), and it was correctly characterized as a confession.

IX.

Defendant's final contention is that his sentence of 20 to 25 years imprisonment is excessive and should be reduced to a minimum of 14 years. We decline to do so. The sentence imposed is within the range permitted by stat-

ute (Ill. Rev. Stat. 1977, ch. 38, par. 1005-8-1(c)) and does not reflect an abuse of the trial court's discretion under the circumstances of this case. *People* v. *Perruquet* (1977), 68 Ill. 2d 149, 368 N.E.2d 882.

Defendant's conviction for murder and sentence thereon is therefore affirmed in all respects.

Affirmed.

UNVERZAGT and WOODWORD, JJ. concur.

APPENDIX B

UNITED STATES OF AMERICA

State of Illinois
Supreme Court—ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of September in the year of our Lord, one thousand nine hundred and eighty, within and for the State of Illinois.

Present:

JOSEPH H. GOLDENHERSH, CHIEF JUSTICE
JUSTICE ROBERT C. UNDERWOOD
JUSTICE HOWARD C. RYAN
JUSTICE THOMAS J. MORAN
JUSTICE DANIEL P. WARD
JUSTICE WILLIAM G. CLARK
JUSTICE THOMAS E. KLUCZYNSKI
TYRONE C. FAHNER, ATTORNEY GENERAL
LOUIE F. DEAN, MARSHAL
ATTEST: CLELL L. WOODS, CLERK

Be It Remembered, that, to-wit: on the 29th day of September 1980, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

People State of Illinois,
Respondent,
No. 53538 vs.
David A. Wolski,
Petitioner.

Petition for Leave to Appeal from the Appellate Court, Second District, No. 78-306.

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now

fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

(Seal) In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 19th day of November, 1980.

/s/ Clell L. Woods Clerk,
Supreme Court of the State of Illinois.

SUPREME COURT, U.S.
FILED
JAN 9 1981
MICHAEL RODAK, JR., CLERK

No. 80-863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID A. WOLSKI,

Petitioner,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, SECOND DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Was the affidavit in support of the search warrant sufficient to meet the requirements of the fourth amendment?

2. Does the instant case fall outside the scope of *Franks* v. *Delaware* with the result that the affidavit for the search warrant was valid?

3. Could the initial restraint of petitioner's person, required for the execution of the search warrant by police officers form the basis for suppression of petitioner's oral statement?

4. Was there sufficient evidence presented at trial to raise the defense of self-defense so that the trial court was required to instruct the jury on self-defense?

5. Did the Illinois appellate court's application of the farce or sham standard used to evaluate petitioner's claim of ineffective assistance of counsel protect his fourteenth amendment rights to effective assistance of counsel and equal protection of the laws?

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No. 80-863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID A. WOLSKI,

Petitioner,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, SECOND DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The Illinois Appellate Court was correctly cited in petitioner's brief. (Petition at 2)

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner has quoted those amendments to the United States Constitution applicable to this case. (Petition at 3).

STATEMENT OF THE CASE

In addition to the Statement of the Case set forth in petitioner's brief (Petition at 5-10), additional facts needed for this Court to consider the Petition for Writ of Certiorari can be found in the Illinois appellate court's opinion, *People* v. *Wolski,* 83 Ill. App.3d 17, 403 N.E.2d 528 (2d Dist. 1980).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The respondent respectfully requests this Court deny the Petition for Writ of Certiorari to review the judgment of the Illinois Appellate Court, Second District, insofar as petitioner's issues do not raise questions of constitutional proportion that are worthy of review. In seeking a writ of certiorari in this cause, petitioner alleges five separate reasons for granting the writ. The issues involve questions of particular application of recent and well-defined decisional law of this Court to the facts of the instant case. Respondent maintains that it would not be prudent for this Court to grant certiorari because the issues herein revolve around facts peculiar to the case at bar and would not involve issues germane to any future litigants.

I.

THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT WAS SUFFICIENT TO MEET THE REQUIREMENTS OF THE FOURTH AMENDMENT.

The petitioner contends that the statements in the affidavit were not facts but mere conclusions, and that the allegations were not made with sufficient detail to supply the magistrate

with probable cause. However, an affidavit is not required to set out the facts in minute detail. It is clear that affidavits for search warrants are to be tested in a common sense and realistic fashion. All efforts should be made to avoid hypertechnical interpretations and doubtful cases should be determined largely by the preference which the law accords to warrants. *United States* v. *Ventresca,* 380 U.S. 102 (1965).

The affidavit stated that the Master Charge slip was found near the body of the decedent. In fact, the evidence was found approximately 6 feet from the body. Respondent maintains that at that distance, the charge slip was certainly near the body. The magistrate also had present the officer who discovered the charge slip at the crime scene. If the magistrate questioned the meaning of the word "near" that information would have been available to him.

The petitioner argues that the affidavit was defective for the reason that there was not a description by the affiant of the source of information, thus preventing the magistrate from making any determination of the reliability of that information. Respondent would point out that the police officer who was the affiant appeared in person, under oath, before the magistrate. All of the facts in the affidavit were either facts known to the affiant personally or obtained through the investigations undertaken by other officers. This type of hearsay information, the work product of other officers, has been held to provide a reliable basis for a warrant sought by one of the officers. When an officer applies for a search warrant based on information supplied by fellow officers, it is unnecessary for him to vouch the reasons he has for believing his informants are reliable. *United States* v. *Harrick,* 582 F.2d 329 (4th Cir. 1978). Therefore, the affidavit need not set forth the basis for the reliability of the facts. All the facts alleged in the affidavit were derived through police investigation by the affiant or other officers; and the source of the information concerning the decedent hitch-hiking, was a private citizen.

To require the affiant to minutely detail every fact appearing in an affidavit would not be in keeping with the realistic, common sense approach to complaints for search warrants. The courts below fully considered and correctly decided this issue.

Contrary to petitioner's position the respondent maintains that the presence of the petitioner's Master Charge slip at the crime scene was sufficient to generate reasonable grounds that the petitioner at least was connected in some way to the crime scene. The presence of the charge slip was sufficient to warrant a reasonable man in believing that petitioner was present at the crime scene at some point in time. Moreover, the date of the charge slip, July 21, the day before the body was discovered, further supported petitioner's relationship to the crime scene.

Once the petitioner was linked to the offense, it was reasonable to believe that evidence of his involvement, if any, would be found on his person, in his car, or at his residence. The assertions contained in the affidavit provided this reasonable basis linking petitioner to the offense and probable cause was established for issuance of the warrant.

This Court should deny the petition for a writ of certiorari in that the issues contained in the first argument of petitioner's brief are not important enough to warrant review. The issues are limited and controlled by the facts of the instant case.

II.

THE INSTANT CASE FALLS OUTSIDE THE SCOPE OF *FRANKS* V. *DELAWARE*, AND AS A RESULT THE AFFIDAVIT FOR THE SEARCH WARRANT WAS VALID.

Petitioner claims that the affidavit for the search warrant affirmatively misstated the facts and is, therefore, invalid under *Franks* v. *Delaware*, 438 U.S. 154 (1978). Petitioner takes issue with the use of the word "near" to describe the placement

of the Master Charge receipt in the affidavit for the search warrant. Petitioner's reliance on the *Franks* decision is misplaced. In *Franks,* this Court held that where a defendant makes a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." *Id.* at 155-56. The foundation requirement of a false statement which must be present to necessitate a hearing on the issue is not found in the instant case.

Respondent maintains that in the context in which the word "near" was used, it was not a false statement. The use of the word "near" by the affiant was truthful in the sense that the information regarding the location of the Master Charge receipt in the affidavit was believed or appropriately accepted by the affiant as true. *Id.* at 165. Although "near" is a relative term to describe distance, it cannot be found to be a false statement in the context of the *Franks* decision. The word "near" clearly was sufficiently descriptive of where the charge slip was found. The charge slip was found approximately six feet from the body of the victim in underbrush in a wooded area. That distance clearly locates the charge slip near the body in the common sense understanding of the word. Therefore, it cannot be said that there was any misstatement of facts, deliberate or otherwise in the affidavit.

Furthermore, if "near" is not construed as descriptive of a distance of six feet, it is clear that the use of the word "near" was not a deliberate falsehood on the part of the officer or even a reckless disregard for the truth. The language used in the affidavit was chosen in good faith by the officer who would be reasonable in assuming that six feet was equivalent to "near". The petitioner has not demonstrated any intentional or deceptive misstatements by the officer such as would invalidate the search warrant.

Assuming *arguendo* that the word "near" should not have been used, the affidavit did set forth particular facts and circumstances underlying the existence of probable cause so as to allow the magistrate to make an independent evaluation of the matter. Consequently, the magistrate reviewing the application for the warrant is entitled to draw reasonable inferences from the facts contained in the affidavit based upon his experience in such matters. In the case at bar, the affidavit should be considered in a commonsense, nontechnical manner with deference given, in a marginal case, to the prior determination of probable cause by the issuing authority. *Spinelli* v. *United States,* 393 U.S. 410, 419 (1969). Based upon these unique circumstances the use of the word "near" in the affidavit for the search warrant did not violate petitioner's fourth amendment rights.

III.

THE INITIAL RESTRAINT OF PETITIONER'S PERSON, REQUIRED FOR THE EXECUTION OF THE SEARCH WARRANT BY POLICE OFFICERS, COULD NOT FORM THE BASIS FOR SUPPRESSION OF PETITIONER'S ORAL STATEMENT.

The petitioner contends that he was under arrest at the time of the initial encounter with police officers outside his residence, although at the time probable cause for the arrest did not exist. Despite the petitioner's contentions to the contrary, the petitioner was not under arrest at the time of the initial encounter with the police. At the hearing on petitioner's motion to suppress statements, three police officers who were present during the search testified that petitioner had not been placed under arrest before the search of his residence disclosed his blood-stained undershorts. Petitioner's argument that the initial restraint of his person amounted to an illegal arrest requiring suppression of his statement is illogical. Petitioner must necessarily have been reasonably restrained in order for police to execute the search of his person.

The police were acting pursuant to a valid search warrant which authorized the search of petitioner's person, residence, and automobile. Respondent concedes that petitioner was "seized," in that his freedom of movement was restrained during the execution of the search warrant. However, the fourth amendment is not required to eliminate all contact between the police and the citizenry, but to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals. *United States* v. *Mendenhall*, ____ U.S. ____, 100 S.Ct. 1870 (1980). The objective justification for the seizure was for the execution of the search warrant. In the case at bar, the seizure of petitioner was made pursuant to the execution of the search warrant. The encounter between petitioner and the police intruded upon no constitutionally protected interest.

Upon execution of the search warrant, an item described in the warrant, blood-stained undershorts, was discovered. It was at this point, after the discovery of the evidence, that the police had probable cause to believe petitioner committed an offense, thus justifying his arrest. Based upon evidence discovered pursuant to a valid search, probable cause existed to arrest petitioner. Insofar as the arrest was valid, it follows that petitioner's statement to the police was admissible at trial.

IV.

SINCE THERE WAS NOT SUFFICIENT EVIDENCE PRESENTED AT TRIAL TO RAISE THE DEFENSE OF SELF-DEFENSE, THE TRIAL COURT CORRECTLY REFUSED TO INSTRUCT THE JURY ON SELF-DEFENSE.

Petitioner alleges that the trial court's refusal to instruct the jury on his claim of self-defense denied petitioner the right to a jury trial and due process of law. Respondent does not dispute that a defendant is entitled to adequate instructions to the jury

on his theory of defense, provided there is evidence to reasonably support the theory and permit a jury rationally to find him innocent. *United States* v. *Hoopes,* 545 F.2d 721 (10th Cir. 1976). Respondent agrees with this general proposition, but r aintains that a self-defense instruction to the jury was incompatible with the evidence presented at trial.

Petitioner tendered a jury instruction on self-defense which provided that "a person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force." The jury instruction on self-defense was taken directly from Ill. Rev. Stat., ch. 38, § 7-1 which defines the justifiable use of force in defense of a person. The Committee Comments to section 7-1 state that a person "must actually believe that the danger of harm exists and that his use of force is necessary to avert the danger." Ill. Ann. Stat. ch. 38, § 7-1 (Smith-Hurd).

The trial court refused the instruction for the reason that the court concluded the evidence did not present evidence of the defense. Accepting petitioner's version of the incident no fair minded jury would have believed that petitioner was in fear at the time he struck the decedent. Petitioner struck her on the head with a 2½ lb., 11½" long steel bar while positioned on top of her on the front seat of his car; he was 26 years old, a veteran, and weighed approximately 265 pounds while decedent was 14 years old and weighed about 120 pounds. It is clear that the evidence adduced at trial did not constitute any evidence that petitioner reasonably believed that it was necessary to use deadly force to prevent imminent death or great bodily harm to himself.

On the evidence presented, it would have been unreasonable for the jury to acquit the petitioner of murder on the theory of self-defense. Petitioner was not entitled to a self-defense jury instruction merely because he requested the instruction. His

conduct was such as to refute the claim of self-defense, and therefore, his contention that he acted in self-defense was obviously an after-thought. In view of the undisputed evidence that the decedent was brutally beaten to death, no error was committed by the court's failure to give the tendered instruction. The Illinois appellate court fully considered and correctly decided this issue. Therefore, this Court should deny the petition for a writ of certiorari.

V.

THE ILLINOIS APPELLATE COURT'S APPLICATION OF THE FARCE OR SHAM STANDARD USED TO EVALUATE PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL PROTECTED HIS FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND EQUAL PROTECTION OF THE LAWS.

1. The Farce Or Sham Standard Used To Evaluate Petitioner's Claim of Ineffective Assistance Of Counsel Sufficiently Protected His Rights Under The Sixth And Fourteenth Amendments.

Petitioner contends that the Illinois courts' application of the farce or sham standard in evaluating a claim of ineffective assistance of trial counsel is not a constitutionally permissible standard. This Court must reject petitioner's claim in that the Illinois standard is sufficient to protect petitioner's sixth and fourteenth amendment rights.

To test a claim of ineffective assistance of trial counsel in Illinois, a defendant must prove that the caliber of representation was so low as to reduce the trial to a farce or a sham. *People* v. *Washington,* 41 Ill.2d 16, 241 N.E.2d 425 (1968). Illinois courts have characterized this standard as requiring a showing of no representation at all, *People* v. *DeSimone,* 9 Ill.2d 522, 138 N.E.2d 556 (1956), or such representation as to

deprive the defendant of the chance of being acquitted of the offense. *People* v. *McCoy,* 80 Ill. App.2d 257, 225 N.E.2d 123 (1st Dist. 1967). Courts have held it is not enough to sustain the allegation of ineffective assistance of counsel by demonstrating that the representation was merely poor, *People* v. *Hicks,* 362 Ill. 238, 199 N.E. 368 (1935), or by showing that counsel's trial tactics were unsuccessful. *People* v. *Gill,* 54 Ill.2d 357, 297 N.E.2d 135 (1973).

Petitioner argues that the Illinois test for evaluating an ineffective assistance of counsel claim is not a constitutionally permissible standard of review. Respondent maintains that petitioner's proposed standard would not any better set forth the prerequisites demanded by the constitutional mandate to furnish defendants with effective assistance of counsel. No test can be formulated which will, in advance of close scrutiny of the trial record furnish a definitive checklist of what is needed to sustain a defendant's assertion of a constitutional deprivation by ineffective assistance of counsel.

The present test in Illinois is the product of competing public policies: the first is that every defendant should have available the means of securing every legal defense possible. The competing reason is the practical recognition that no attorney is perfect, no trial tactic is fail safe, and few trials are error free. *People* v. *Ortiz,* 22 Ill. App. 3d 788, 317 N.E.2d 763 (1st Dist. 1974). A second reason for allowing flexibility in the standard of review is to protect against mere pretended ineffective assistance on the part of trial counsel. *People* v. *Fleming,* 50 Ill.2d 141, 277 N.E.2d 872 (1971). The constitutional provision requires reversal of a conviction where it is shown that the legal representation caused such substantial prejudice to a defendant so as to deny him fundamental fairness. Specifically, in order to successfully sustain an allegation of inadequate representation at trial, the defendant must clearly establish (1) actual incompetence of counsel as reflected

by the manner of carrying out his duties at trial, and (2) substantial prejudice resulting, without which the outcome would probably have been different. *People* v. *Virgil,* 54 Ill. App. 3d 682, 370 N.E.2d 74 (1st Dist. 1977). However, the fact that another attorney in the light of hindsight might possibly have conducted the trial in a different manner should not be accepted as an indication of ineffectiveness. *People* v. *Baer,* 35 Ill. App.3d 391, 342 N.E.2d 177 (1st Dist. 1976).

The standard used by the Illinois court in the instant case is an acceptable one under the United States Constitution for reviewing an incompetency of counsel claim. In the case at bar the Illinois appellate court applied the standard and from its examination of the record it found "the representation afforded to defendant did not violate this standard." *People* v. *Wolski,* 83 Ill. App. 3d 17, 27, 403 N.E.2d 528, 536 (2nd Dist. 1980). The Illinois standard is an adequate expression of the rationale behind the sixth and fourteenth amendments, and consequently should withstand constitutional scrutiny.

2. The Farce Or Sham Standard, Under Which Illinois Courts Review Claims Of Ineffective Assistance Of Counsel Is Applied For Both Appointed And Retained Counsel.

Petitioner argues that under Illinois law, a different standard is used to review claims of ineffective assistance of retained counsel versus claims of ineffective assistance of appointed counsel. This Court must reject petitioner's claim as the standard applied by the Illinois reviewing courts for evaluating claims of ineffective assistance of counsel is the same for both retained and appointed counsel.

It is true that Illinois appellate courts in the past reviewed a defendant's claim of ineffective assistance of counsel by utilizing separate and distinct tests based upon whether counsel was privately retained or court-appointed. *People* v. *Morris,* 3 Ill.2d

437, 121 N.E.2d 810 (1954). Under *Morris,* a defendant who retained his own counsel could not raise the claim of counsel's failure to exercise care and skill in the trial of the case as a basis for reversing a judgment of conviction. *Id.* at 444-45, 121 N.E.2d at 815. However, a defendant who was represented by court-appointed counsel could claim ineffective assistance of counsel and obtain a reversal of the conviction. Petitioner relies on the *Morris* decision for his position that Illinois courts use a different, higher standard for evaluating the quality of representation accorded a defendant with retained counsel as compared to a defendant with court-appointed counsel.

Subsequent Illinois Supreme Court decisions expanded the right to adequate assistance of counsel so that a defendant with retained counsel could raise the claim on appeal of ineffective assistance of counsel. *People* v. *Somerville,* 42 Ill.2d 1, 5, 245 N.E.2d 461, 464 (1969); *People* v. *Nelson,* 42 Ill.2d 172, 175, 246 N.E.2d 244, 246 (1969). While the cases speak in terms of some distinctions between retained counsel and court-appointed counsel, it appears that the necessity for showing ineffective assistance of counsel is essentially the same in both instances. The Illinois appellate courts have flatly rejected the argument that the standard for evaluating the representation of retained counsel differs from the standard used for evaluating the representation of court-appointed counsel. The requisite standard which has developed is the same, namely, the ineffectiveness of counsel must not be of such character as to reduce the trial to a farce or sham. *People* v. *Virgil,* 54 Ill. App.3d 682, 370 N.E.2d 74 (1st Dist. 1977); *People* v. *Ortiz,* 22 Ill. App.3d 788, 317 N.E.2d 763 (1st Dist. 1974).

Illinois law, by providing for a uniform standard for reviewing claims of ineffective assistance of trial counsel, has protected the petitioner's rights to the equal protection of the laws.

CONCLUSION

For the foregoing reasons, respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 80-863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID A. WOLSKI,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER [1]

The State's response to the crucial issue raised by the petitioner is facially absurd and contrary to the law.

Such a response was unavoidable. The Attorney General of Illinois could not, after considering the facts, the law and the opinion below, state any rational legal argument.

[1] The numerical division of the Argument which follows is dictated by logic and does not correspond to the numbered Points in the Petition.

1.

Petitioner's argument:

> "The magistrate was not advised of crucial facts as to distance, nor was he advised as to locale [because] . . . 'near' is a conclusion" so that the magistrate was not presented with facts necessary to make an independent determination of probable cause. (Pet. pp. 12-14)

Response:

> "The magistrate also had present the officer who discovered the charge slip . . . If the magistrate questioned the meaning of the word 'near' that information would have been available to him." (Res. p. 3)

Respondent's assertion that the validity of an affidavit for search warrant is not tested by what the officer stated therein, but by what the officer *could* have told the magistrate is erroneous.

> "Under the cases of this Court, an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate. . . . A contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless." *Whiteley v. Warden of Wyoming Penitentiary*, 401 U.S. 560, at 565, n. 8.

2.

Petitioner argues that Allegation 4[2] fails to supply necessary temporal relationship between deceased's

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[2] Allegation 4 reads:

> "That Joy E. Lewis was last observed hitchhiking on Washington Street near Bailey Road in Naperville at 8:15 p.m. on July 21, 1977."

death and the presence in the area of the receipt because the magistrate was not provided information as to how the person knew he saw Joy E. Lewis. To this argument, the State responds:

> "All the facts alleged in the affidavit were derived through police investigation by the affiant or other officers; the source of the information concerning decedent hitchhiking, was a private citizen." (Res. p. 3)

That the source of information in an affidavit is provided by police investigation or obtained from a citizen is insufficient. Although citizen-supplied information need not satisfy the reliability requirement as to the citizen's honesty, the magistrate must be advised of the *source*—underlying facts—of the citizen's opinion. Here, none exists.

3.

Petitioner argues that finding the charge slip, without more, is insufficient to establish probable cause. The State responds:

> "The presence of the charge slip was sufficient to warrant a reasonable man in believing that petitioner was present at the scene of the crime at some point in time and that this linked him to the offense." (Res. p. 4)

The State's response is neither accurate nor logical. The evidence demonstrates only that at some point in time a charge slip belonging to petitioner (an item that could easily blow in the wind) found its way near to the crime scene. This fact alone cannot reasonably lead one to conclude that petitioner was present, or even "near." Even assuming the State's response to be accurate, the fact that petitioner was at the crime scene *at some point in*

time does not supply probable cause to believe that petitioner was "linked to the offense."

There was no probable cause.

4.

Petitioner asserts that he was arrested without probable cause; and the State so concedes. This assertion cannot be diluted by stating that the police officers, who, with drawn guns, forced the defendant into his house, did not consider their seizure of the petitioner to be an arrest. (Res. p. 6) Similarly, the unconstitutionality of petitioner's arrest cannot be justified as essential to the search inside the house. He was arrested outside the house. Furthermore, his arrest and detention by officers with drawn guns cannot be excused by reference to *United States v. Mendenhall*, 100 S.Ct. 1870, where the court found defendant consented to accompany the officers where the police "wore no uniform and displayed no weapons." (100 S.Ct. 1870).

5.

Petitioner asserts that he had a right to a self-defense instruction. He testified that he panicked and struck in self-defense after having been kicked in the groin sufficiently hard to cause bleeding. The State counters with the off-handed assertion:

> "No fair minded jury would have believed that petitioner was in fear at the time he struck the decedent." (Respondent's Brief, p. 8)

Due process does not permit speculation of what a fair minded jury would have done, but requires instructions on the applicable law so the jury can decide what it would have done. *Bollenbach v. United States*,

326 U.S. 607, 90 L.Ed.2d 350; *Beck v. Alabama*, ... U.S. ....., 65 L.Ed.2d 392.

6.

Petitioner's assertion that the Illinois farce or sham test, rejected by ten federal circuits, is inconsistent with this court's interpretation of the Sixth Amendment in *McMann v. Richardson*, 397 U.S. 759 inadequately countered by the response:

> "The Illinois standard is an adequate expression of the rationale behind the Sixth and Fourteenth Amendments and consequently should withstand constitutional scrutiny." (Res. p. 11)

The respondent states no reason why the standard is valid. None exists.

7.

Petitioner's assertion that there exists in Illinois an unconstitutional dual standard—one for private counsel and one for appointed counsel—is not disputed by the empty, meaningless statement:

> "While the cases speak in terms of some distinction between retained counsel and court appointed counsel, *it appears that* a necessity for showing ineffective assistance of counsel is essentially the same in both instances." (Res. p. 12) (Emphasis added.)

"It appears that" is one of those empty terms like "helps" used so frequently in T.V. commercials. It is a "weasel" word used to hide the truth.[3]

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[3] Paul Stevens, *I Can Sell You Anything* (published by Peter H. Wyden, New York, N.Y. 1972, pages 23-30).

Dicta from two cases indicating no distinction in standards, *People v. Virgil*, 54 Ill. App. 3d 682, 370 N.E.2d 74 (1st Dist. 1977); *People v. Ortiz*, 22 Ill. App. 3d 788, 317 N.E.2d 763 (1st Dist. 1974), does not alter that a different district, the Second Appellate District—the one that decided petitioner's case—believes there is a different standard and so stated:

> "The standard applied in Illinois to judge the competence of retained counsel is whether the caliber of representation was so low as to amount to no representation at all or to reduce the court proceedings to a farce or sham." (App. 14a, Def. Orig. Br.)

and relied on *People v. Murphy*, 72 Ill. 2d 421, 381 N.E.2d 677, *People v. Anderson*, 65 Ill. App. 3d 783, 382 N.E.2d 866, which recognized the existence of a different standard applicable to privately retained counsel than appointed counsel.[4]

Irrespective of dicta of some district courts in Illinois others clearly recognize and apply a different standard in retained counsel and in court-appointed counsel cases.

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[4] In *People v. Anderson*, the court stated:

> "Defendant urges the court to adopt a uniform standard for both retained and appointed counsel but we do not reach this issue since, in our view, under either standard the claim of incompetent counsel has not been sustained." 382 N.E.2d at 871.

CONCLUSION

As demonstrated above, the Attorney General of Illinois has not been able to present any arguments founded upon law, policy or logic. The Attorney General's inability to present any decent arguments demonstrates the erroneous nature of the opinion below.

Respectfully submitted,

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